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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 14.

ALBERT BENJAMIN CHANDLER, Individually and as Governor of the Commonwealth of Kentucky, Et Al., - - - - - - Petitioners,

versus

JAMES E. WISE and RAY B. MOSS, - - Respondents.

BRIEF FOR RESPONDENTS

IN REPLY TO

"BRIEF FOR THE UNITED STATES AMICUS CURIAE,"

"BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF WISCONSIN" AND

"BRIEF ON BEHALF OF RESPONDENTS," *COLEMAN, ET AL., v. MILLER, ET AL.*, October Term, 1938, No. 7.

LAFON ALLEN,
OLDHAM CLARKE,
Both of Louisville, Kentucky,
Attorneys for Respondents.

March, 1939.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

No. 14 — October Term, 1938

Reply Brief for Respondents

ERRATUM

Page 23, fourth line from top:

"Eighteenth" should be "Fourteenth".

SUBJECT INDEX.

	PAGE
QUESTIONS HEREIN DISCUSSED	1– 5
ARE REJECTIONS UNAVAILING?	
RESPONSE to arguments for the affirmative, found in adversary briefs	5–24
WHAT IS A "REASONABLE TIME" FOR ADOPTION?	
RESPONSE to arguments against lapse of proposal for Child Labor Amendment, found in adversary briefs	25–46
CONCLUSION	46–47

TABLE OF AUTHORITIES.

Cases Cited.

	PAGE
Calhoun County v. Galbraith, 7 Otto, 214, 25 L. Ed. 410	4
Dillon v. Gloss, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994	2, 25, 26, 30, 33
Ex Parte Milligan, 4 Wall. 2	23, 24
Fletcher v. Peck, 6 Cranch. 87	3, 17
Hawke v. Smith, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 1504	2
McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579	2
Rhode Island v. Palmer, 253 U. S. 350, 64 L. Ed. 946	13
Society for Savings v. New London, 29 Conn. 174	4
Woodward v. Board of Supervisors, 2 Central Law Journal, 396	4

Texts Cited.

American Bar Association Journal, Vol. XXIII, No. 12, p. 915	40
Curtis, Constitutional History of United States, Vol. II, 376, 380, 394	12
Dallas Daily News, May 24, 1935	39
Documentary History of the Constitution, Vol. 2, 783, 788, 893	4, 19
Elliot's Debates, Vol. IV, 242	3
Federalist No. 43	8
Flack, Adoption of Fourteenth Amendment, 140, 161	14
Hamilton, Works, Vol. I, 463	3
Jameson, Constitutional Convention (1st Ed.), §563	5
Jameson, Constitutional Convention (4th Ed.), §§585, 586	34
Mill, Dissertations and Discussions	10
Story, Constitution (5th Ed.), 600	8
Topeka Daily Capital, Feb. 21, 1937	41
United States Senate Report 788	37
Watson, Constitution of the United States, Vol. II, 1310-11	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 14.

ALBERT BENJAMIN CHANDLER, INDIVIDUALLY AND AS GOVERNOR OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - *Petitioners,*

v.

JAMES E. WISE AND RAY B. MOSS, - *Respondents.*

REPLY BRIEF FOR RESPONDENTS.

At the time of the filing of our original brief (October 1, 1938), we had seen neither the "Brief for the United States Amicus Curiae" nor the "Brief Amicus Curiae on Behalf of the State of Wisconsin," both filed herein. Nor had we then seen "Brief on Behalf of Respondents," filed in the companion case from Kansas, No. 7, October Term, 1938, *Coleman, et al.*, v. *Miller, et al.* The order for a re-argument of the case gives us the first opportunity to respond to these briefs.

Stated broadly, the questions discussed in the briefs heretofore filed are these:

Are the people of the United States, who established the Constitution[1] and to whom was reserved the ultimate power to decide whether or not it should be changed,[2] powerless to make an effective decision against a proposal to change it?

Was it intended by the framers of the Constitution that a proposal by Congress for amending that instrument should survive an overwhelming demonstration of popular disapproval, expressed through representative assemblies in the States of the Union to which the question of amendment was required to be submitted for final decision?

Was it intended that, despite such public hostility, the proposal should remain open to acceptance *in perpetuum* or, to adopt a figure of speech from our original brief, was such a proposal, despite storms of adverse opinion, condemned, like the "Flying Dutchman," to drift about the political seas forever?

There are, of course, subsidiary questions, but, in the last analysis, these are the questions to which an answer must be found.

A great deal of nonsense has been written on this subject, as was perhaps to be expected from commentators who, having no clear precedent to guide them and being free from that sobering sense of responsibility which affects the judgment of a court, are prone to seize upon faint analogies and other "nice sharp quillets of the law" to sustain their conjectures. All

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[1] *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Dillon* v. *Gloss*, 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994.

[2] *Hawke* v. *Smith*, 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 1504.

such catchpenny arguments we would put aside, in the very beginning, believing them to be unworthy of serious consideration. Great as is the respect due Judge Jameson's views on questions of constitutional law, it must be admitted, we think, that he is responsible for the currency of some of these frail analogues and precedents, which, through constant repetition, have come to have a sort of ritualistic importance in the eyes of his disciples.

In this category we place the following incidents and statements, so often encountered in the literature of this subject:

The correspondence between Madison and Hamilton on the admissibility of "conditional ratifications" of the Constitution itself:[1]

The coming into the Union of North Carolina, after having adopted a resolution "neither to ratify nor reject the Constitution" until certain additions were made to it:[2]

Chief Justice Marshall's declaration in *Fletcher* v. *Peck*[3], that "one legislature cannot abridge the powers of a succeeding legislature, ... so far as respects general legislation," made in a case involving (and sustaining) the title to lands in Georgia which Fletcher had obtained by conveyance from Peck, the original grantee from the State of Georgia, under an enabling act, the repeal of which was subsequently attempted:

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[1] "Works of Hamilton," Vol. I, 463.
[2] IV Elliot, 242.
[3] 6 Cranch, 87.

Certain cases (*Society for Savings* v. *City of New London*,[1] *Woodward* v. *Board of Supervisors*[2] and *Calhoun County* v. *Galbraith*[3]), upholding the validity of municipal bond issues which, while failing to be approved at an earlier election, were approved upon a new submission of the question:

New Jersey's superfluous reversal of its position on the Thirteenth Amendment, from rejection to ratification, after that Amendment had been proclaimed as part of the Constitution upon the basis of ratifications by the requisite number of States, not counting New Jersey:

New York's attempted withdrawal of its ratification of the Fifteenth Amendment, mentioned in the proclamation of Hamilton Fish, Secretary of State of the United States, showing ratifications by more than three-fourths of the States, without counting New York.[4]

And we add to these the apprehension of the Solicitor General, in this case, that an affirmance of the judgment below might "carry with it the present downfall of the Fourteenth Amendment."[5]

The foregoing events and expressions of opinion are, we think, too remote or too tenuous to justify further notice. We proceed, therefore, to a consideration of the question first above stated, with special reference to other arguments advanced in the amicus briefs referred to above as having been filed after the filing of our original brief.

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[1] 29 Conn. 174.
[2] 2 Central Law Journal, 396.
[3] 7 Otto, 214; 25 Law Ed. 410.
[4] 2 Documentary History of the Constitution, 893.
[5] Amicus Brief for United States, p. 5.

We realize, of course, that the answer to that question must be found in the Constitution itself. But we anticipate that the Court, as in the past, will seek and find the answer, not in the letter, which killeth, but in the spirit, which maketh alive.

ARE AFFIRMATIVE REJECTIONS UNAVAILING?

Judge Jameson, in the first edition of his book, said (for even Homer sometimes nods) that, since "rejection" of a proposal to amend the Constitution was not mentioned in Article V, "it would seem a stretch of power" to read the word into that Article and concluded, therefore, that the rejection of such a proposal, even by all of the States, could not "be taken to be definitive."[1] The Attorneys General of Kentucky, of Kansas and of Wisconsin adopt this conclusion.[2] The Solicitor General of the United States, using a more modern idiom, says that "the concept of rejection is not to be found" in Article V and that "rejection is, therefore, an extra-constitutional concept."[3] An affirmative rejection of a proposed amendment or a failure or refusal to pass a resolution of ratification, he says, "are all constitutionally neutral events."[3]

Judge Jameson leaves us room for argument. To his assertion that rejection is not allowed because it is not mentioned, we can respond that it is implied in the

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[1]Jameson, "The Constitutional Convention," §563, 1st ed.

[2]Brief for petitioners, *Chandler* v. *Wise*, p. 12 *et seq.*;
Brief for respondents, *Coleman* v. *Miller*, p. 6 *et seq.*;
Amicus Brief for State of Wisconsin, p. 3.

[3]Amicus Brief for U. S., p. 11.

power to decide. But the Solicitor General is unanswerable. He does not say, as Judge Jameson did, that the idea of rejection is not in the Constitution because *the word* is not there. He says that the idea of rejection is not in the Constitution because that *idea* is not there. "The concept of rejection is not there to be found and is, *therefore,* extra-constitutional." Those are his words,[1] although the emphasis is ours. Who can gainsay the statement that what is not found in the Constitution is not contained in it?

But the Solicitor General at once abandons this intransigent position and proceeds to urge the difficulty of finding a satisfactory definition of "the concept of rejection." He says of that concept that, "if it means anything, it means an affirmative vote of rejection of both houses." But he immediately shifts his ground and in the next following sentence says that "logically it must mean more."[2]

This agility leaves us somewhat breathless. How are we to reconcile the statements that the concept of rejection can mean only one thing but that, "logically," it means something else? In explanation of the latter statement, the Solicitor General proceeds to say that the defeat in both houses of a resolution for ratification is "in substance the same as the adoption of a resolution of rejection." He adds that the defeat in one house of a motion to ratify, or a disagreement between the two houses of a legislature, one ratifying and the other rejecting; or the failure of one

[1]Amicus Brief for U. S., p 1.
[2]Ibid., pp. 11 and 12.

house to concur in a resolution of ratification adopted by the other house, or ratifications in both houses but in different terms ("with conditions or alterations"), might be considered as rejections, although he is good enough to say that he believes we "would stop short of imposing so drastic a restriction on the amending process."[1]

We have never entertained the thought of "so drastic a restriction." In our former brief, while we made mention of various forms of failure or refusal to ratify as indications of public opposition to the proposed amendment, we insisted that decisive action of a State legislature on a proposal for amending the Constitution must be by the adoption in both houses of an affirmative resolution, either ratifying or rejecting the proposal. This was our definition of "the concept of rejection." It seems to us plain that a mere refusal to take action, whether by both houses or by one, or a defeat of a resolution of ratification, whether by both houses or by one, however significant it may be, in a given case, of hostility to the proposal, cannot be counted as an exercise of the power to reject, which we claim is implied in Article V. Only affirmative concurrent action by both houses is a clear expression of a conclusive decision, for or against the proposal. A refusal to act by one or both houses or adverse action by one or both houses upon a motion to ratify might very well be due to a desire to take further time for consideration. Doubtless such action has frequently been taken because of settled opposition. Only

[1]Amicus Brief for U. S., pp. 12 and 13.

the other day (February 20, 1939) the Massachusetts House of Representatives defeated a motion to ratify the Child Labor Amendment by a vote of 195 to 13 and it was stated in the press report of that action that it "marked the fifteenth unsuccessful attempt to obtain the State's endorsement of the Amendment." This was undoubtedly a renewed expression of the opposition of the people of that State to this proposal, which it had affirmatively rejected as early as 1925. But this latest action of the Massachusetts House, if standing alone, could not be counted as an affirmative rejection of the proposal. It is only an affirmative rejection by both houses of a legislature which we claim constitutes a final and conclusive vote of a State against such a proposal.

This is the definition of "the concept of rejection" which we propose and we submit that it dissipates all of the doubts and misgivings entertained by counsel for the United States.

But the Solicitor General finds still a further difficulty. He says[1] that "the notion of rejection as precluding reconsideration by a legislature is hostile to the deliberative and representative character of the amending process." He borrows the great names of Madison[2] and Story[3] to support this thesis. The only expression found in The Federalist, No. 43, which has any tendency to support the Solicitor General's position is the following:

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[1]Amicus Brief for U. S., p. 13.

[2]The Federalist, No. 43.

[3]Story on the Constitution, p. 600 (5th ed.).

> "It" [Article V] "guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."

We assume that no one will be inclined to dispute the soundness of this statement but it seems to us to throw little light upon our subject. The passage referred to in Judge Story's Commentaries is as follows:

> "Two-thirds of congress, or of the legislatures of the states, must concur in proposing, or requiring an amendment to be proposed; and three-fourths of the states must ratify them. Time is thus allowed and ample time for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action. An amendment, which has the deliberate judgment of two-thirds of congress and of three-fourths of the states, can scarcely be deemed unsuited to the prosperity or security of the republic."

It will be observed that Judge Story was speaking of the time allowed for action both by Congress and the States. As was pointed out in our first brief, this process has always taken a long time, as is shown by the following examples:

Frances E. Willard commenced her campaign for the prohibition of the liquor traffic as early as 1874 but the Eighteenth Amendment was not proposed by

Congress until 1917. It was adopted thirteen months after its proposal.

Susan B. Anthony began her campaign for woman's suffrage before 1865, but the Nineteenth Amendment was not proposed by Congress until 1919. It was adopted in less than fifteen months after its proposal.[1]

The agitation for the repeal of the Eighteenth Amendment was commenced in 1919 but the Twenty-first Amendment was not proposed by Congress until 1932. It was adopted nine and one-half months after its proposal.

The agitation for the elimination from the Constitution of the prolonged interval between the election of members of Congress and their taking office was begun many years ago but the Twentieth Amendment was not proposed until 1932. It was adopted eleven months after its proposal.

Florence Kelley began the campaign for a child labor amendment in 1905, but it was not proposed by Congress until 1924. It was affirmatively rejected by both houses in 22 States within eighteen months after its proposal, as against 4 ratifications. We do not count here 13 additional States in which it had, within the same time, been affirmatively rejected by one house or defeated on motion to ratify.

We surmise that, if Judge Story were with us now, he would say, with reference to the present status of

[1] In the *Westminster Review* for July, 1851, John Stuart Mill wrote, "Most of our readers will probably learn from these pages for the first time that there has arisen in the United States . . . an organized agitation on a new question—the enfranchisement of women." ("Dissertations and Discussions"; London, 1859.)

the Child Labor Amendment, that thirty-four years was ample time for "a deliberate judgment" upon Mrs. Kelley's proposal. Certainly he would not say that the rejection of that proposal had been "carried by surprise, or intrigue, or artifice." If anything, the shoe is on the other foot.

The Solicitor General next makes the suggestion that the omission by Congress to limit the time for adoption of the Child Labor Amendment was intended to give an unusually long time for consideration of the proposal and in support of this idea he says that

> "It is of the essence [of the amending process] that there be opportunity, at least before rights have become vested, for renewed consideration in the light of fuller knowledge and further reflection. The tendency to reject what is novel may induce a rejection which on more sober second thought will appear to have been ill considered. Or, the rejection may have sprung from a misapprehension of the popular will, only subsequently made clear. There should be no vested rights in action thus regretted and renounced."[1]

To all of this we respond that the whole history of the exercise of the powers conferred by Article V refutes the notion that, following the proposal for an amendment by Congress, any such prolonged period for deliberation or any such opportunity for recantation is required or was intended. The average time

[1] Amicus Brief for U. S., p. 13. See also Respondents' brief, *Coleman v. Miller*, p. 18 *et seq.*, and Amicus Brief for Wisconsin, p. 18, *et seq.*

taken for the adoption of the twenty-one amendments now in effect was one year and eleven months after proposal. The average time taken for the adoption of the last eleven amendments (following the "Bill of Rights") was one year, six months and thirteen days after proposal. The "ample deliberation" mentioned by Judge Story (except in the case of the three Civil War Amendments) has invariably taken place prior to proposal by Congress. With the exceptions noted, action by the States has always followed close on the heels of proposal.

The Thirteenth, Fourteenth and Fifteenth Amendments were the fruits of the victory of the Union armies. It can hardly be said that deliberation had a part either in their proposal or their adoption. They were, as Charles Sumner himself said, "born of the bayonet."[1] They come under Judge Story's exception, "unless some pressing emergency calls for instant action."

It is quite grotesque to suppose that a proposal by Congress for amending the Constitution comes as a complete surprise to the States and their citizens. Is it meant to be suggested that the deliberations of Congress on such a question are conducted for years behind closed doors, that the matter under consideration is never mentioned on the platform or in the press and that the proposal comes to the States as a "novelty" which must be rejected by one or more of them just because it is a novelty and that there should, consequently, be an opportunity for "more sober second

[1]Curtis, "Constitutional History of the United States," Vol. II, p. 394.

thought?" Both reason and experience confute such an idea. We submit that the framers of the Constitution, having required a finding of necessity by two-thirds of both Houses of Congress as a prerequisite to the proposal of an amendment, contemplated that this would not occur until after full public discussion, in and out of Congress, and consequently intended that action by the States, upon the submission of the proposal to them, should follow promptly and, to that end, that the first affirmative action of a State should be conclusive and final upon that submission.

We pause here to note that the idea of rejection of a proposed amendment is not unknown to the literature of the Constitution. In *Rhode Island* v. *Palmer* (National Prohibition Cases)[1] Mr. Justice Van Devanter, writing the opinion of the Court, said:

> "The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification *or rejection* of amendments to it" (italics ours).

George Ticknor Curtis, in his "Constitutional History of the United States",[2] said:

> "Perfect freedom in the adoption *or rejection* of any amendment is a fundamental right of every state, *implied in the framework of the amending power*" (italics ours).

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[1]253 U. S. 350, 64 L. Ed. 946.

[2]Vol. II, pp. 376-7.

Horace E. Flack, in his book, "The Adoption of the Fourteenth Amendment", says:

> "The Amendment having passed Congress June 13, 1866, was formally presented to the Secretary of State June 16, and was by him submitted to the several States for ratification *or rejection.*"[1] (Italics ours.)

And he opens Chapter IV of the same work by saying:

> "It now becomes our duty to trace the course of the Amendment before the Legislatures of the several States and to determine, if possible, what they thought it meant and what reasons were given for its approval or disapproval."[2] (Italics ours.)

David K. Watson, in his treatise, "The Constitution of the United States", says:

> "Whether an amendment is proposed by Congress or by convention, it is ratified *or rejected* by the representatives of the people either in the legislatures or in conventions and not by the people voting on it directly."[3] (Italics ours.)

> "When the Fourteenth Amendment was pending in the Senate, Senator Buckalew tried to secure the insertion of a provision 'that the amendment should be passed upon by the legislature of each State at its first session next after its submission, and that no acceptance *or rejection* should be reconsidered or again brought in question at

[1]Chapt. III, "The Amendment before the People," p. 140.
[2]Ibid., Chapt. IV, "The Amendment before the States," p. 161.
[3]Vol. II, p. 1310.

any subsequent session, nor shall any acceptance of the amendment be valid if made after three years from the passage of this resolution', but this was rejected by the Senate. It is, therefore, an unsettled question how long a time the States have in which to ratify an amendment.'"[1] (Italics ours.)

The Buckalew incident is perhaps pertinent for another reason, since it shows that neither the Senator nor the Senate made any discrimination between ratifications and rejections, with respect to their finality.

In our first brief we took occasion to discuss at length the theory advanced by Judge Jameson and adopted by a majority of the later commentators on the Constitution to the effect that, while a State may change its vote from rejection to ratification, it cannot change it the other way, from ratification to rejection.[2] It is well understood that this theory took its rise in the transaction connected with the adoption of the Fourteenth Amendment. We shall not go over that ground again. In short, we have taken the position that the functions and powers of State conventions and State legislatures in passing upon a proposed amendment are identical, a position that is taken by Judge Jameson.[3] We said that no writer had been bold enough to assert that a State convention, having adjourned *sine die* after adopting a resolution of rejection, could thereafter re-assemble and adopt a resolution of ratification.

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[1]Ibid., p. 131.

[2]Brief for respondents, pp. 18-36.

[3]Op. cit., *supra*, §586 (4th ed.).

This challenge has now been taken up. The Solicitor General of the United States, the Attorney General of Wisconsin and the Attorney General of Kansas now make that assertion, but upon different grounds. The Attorney General of Kansas seems, at first, to admit, though faint-heartedly, that action by a convention is final. He says:

> "A convention is an extraordinary body of representatives of the people convened only on a special occasion for a specific purpose. It comes into existence for a specific purpose, it acts, and upon adjournment *sine die,* it becomes *functus officio.*"[1]

In this respect he thinks that a convention differs from a legislature, since "the personnel comprising the legislature may change from time to time but the powers, privileges, and duties of the legislature are continuing, unaffected and undiminished by any change in personnel." His position, therefore, is that, even though the action of a convention in rejecting a proposed amendment be final and conclusive, similar action by a legislature is not.

The Attorney General of Wisconsin indulges in no such refinements. He asserts that a convention, equally with a legislature, may ratify after having rejected.[2] The Solicitor General of the United States finds no flaw in the theory that a legislature has greater powers than a convention in this regard, but neither does he see any reason why a convention, hav-

[1]Brief for respondents, *Coleman* v. *Miller*, p. 19.
[2]Amicus Brief for Wisconsin, p. 12.

ing rejected, might not, like a legislature, subsequently ratify.[1]

The only precedent on this point is the action of Congress in directing the Secretary of State to count New Jersey and Ohio as ratifying the Fourteenth Amendment, despite their attempts to rescind their former ratifications. If this precedent is to be followed, it authorizes the conclusion that a State legislature cannot reject after having ratified. We can only repeat that we think the rule as to the finality of first action must work both ways and that the first action taken by a State, upon that submission of the question, is final and conclusive, whether it be by way of ratification or rejection. We cannot admit the claim that a State legislature, in exercising a non-legislative function under Article V, can reverse the action of a former legislature, merely because it can do so, as Chief Justice Marshall said, "so far as respects general legislation."[2]

Before leaving this subject, we think it of some importance to notice a statement made by the Solicitor General as to still another precedent supposed to have been set by the action of Congress in dealing with the Fourteenth Amendment.[3] In opposing the view that a proposal for amendment is defeated by concurrent rejections in more than one-fourth of the States, he says:

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[1]Amicus Brief for U. S., pp. 23-24.

[2]*Fletcher* v. *Peck*, *supra*.

[3]Amicus Brief for U. S., p. 22.

> "It is noteworthy that the precedent of the Fourteenth amendment is strictly relevant on this question, since 10 States out of 37 rejected the Amendment before any of the 10 ratified."

The trouble with this "precedent" is that the facts do not support it. A precedent, in the vocabulary of the law, is a decision by a court or a public official or a political body, authorized to make the decision, which will serve as a rule or guide for future decisions upon similar or analogous facts. It presupposes knowledge of all pertinent facts on the part of the person making the decision. In the instance cited, Congress acted upon the information supplied by Secretary Seward's first proclamation of the adoption of the Fourteenth Amendment. The Act of 1818 required him to name the States which had ratified. Twenty-eight ratifications were required for adoption. The Secretary first named twenty-three States as having ratified but pointed out that two of them, Ohio and New Jersey, had attempted to rescind their former ratifications and expressed a doubt as to their right to do so. He also listed six other States as having ratified by "carpet-bag" legislatures, or, as he expressed it, "by newly constituted and established legislative bodies avowing themselves to be, and acting as the legislatures respectively of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina and Alabama." No mention whatever was made in that proclamation of any rejections of the proposed amendment, except

those attempted by New Jersey and Ohio, after first ratifying.[1]

It was upon this information that Congress acted when, on the day following Seward's first proclamation (July 21, 1868), is declared the amendment to have been ratified by the twenty-nine States mentioned in the proclamation and directed the Secretary to "promulgate" the amendment as part of the Constitution of the United States. It is obvious that this action by Congress cannot be regarded as a decision that concurrent rejections in more than one-fourth of the States had not defeated the proposal, since the Secretary's proclamation, upon which the action of Congress was based, showed no rejections.

Even Secretary Seward's second proclamation (July 28, 1868), which set out in detail all the information in his office as to action taken by the States on this proposal, including both rejections and ratifications, showed only eight rejections in all (North Carolina, South Carolina, Georgia, Texas, Virginia, Kentucky, Delaware and Maryland).[2] It thus appears that, even if all of this information had been before Congress when it adopted its resolution of July 21, 1868, directing the Secretary of State to promulgate the Amendment as part of the Constitution, that action could not possibly constitute the precedent which the Solicitor General claims.

Before dismissing finally the "precedent" of the Fourteenth Amendment, we take notice of a criticism

[1] 2 Doc. Hist. of Constitution of U. S., p. 783.

[2] 2 Doc. Hist. of Constitution of U. S., p. 788.

of the opinion of the court below, made by the Attorney General of Wisconsin.[1] The court below, in discussing the transactions connected with the adoption of the Fourteenth Amendment, had made the following statement:

> "So far as concerns the precedent set by Congress in connection with the adoption of the Fourteenth Amendment, its view is authority for the proposition that a State which has once ratified an amendment has exhausted its power and cannot thereafter reverse its stand. On the other hand, when it comes to the counting of the votes of Georgia and the two Carolinas, the avowed justification of this was not that those States could ratify despite their previous rejections, but that their previous rejections were void because the then governments of those States were illegal and their Legislatures were without authority to act at all."

Upon this, the Attorney General of Wisconsin makes the following comment:

> "There is no law, statute, enactment or proclamation that supports the statement of the court that the avowed justification for counting the votes of Georgia and the two Carolinas was that the prior action of rejection by the three legislatures was action by legislatures without authority."

In answer to this criticism we quote the following excerpts from "The Constitutional History of the

[1] Amicus Brief, Wisconsin, p. 6 *et seq.*

United States" by George Tickhor Curtis,[1] at the point where the author points out the interrelation between the Fourteenth Amendment and the first Reconstruction Act:

> "It could not be, and it was not expected, that the legislatures existing in the Southern States when the reconstruction acts were passed would ratify the Fourteenth Amendment. Men who had fought through a long and bloody war to establish an independent country could not vote to disfranchise themselves and their fellow-citizens; could not consent to exclude from public office, federal or state, a large class of the most intelligent and important of their own people; could not consent that federal power, exerted through the process of amendment, should determine who were to be deemed citizens of a state; could not consent to render invalid the debts contracted by their state in carrying on the late civil war, thus destroying state securities in which much private property was invested."

After stating that the process devised for securing the adoption of the Fourteenth Amendment "was one of coercion," the author proceeds as follows:

> "The process devised for this purpose by the reconstruction acts was to treat the governments existing at the time of the passage of the acts as merely provisional, and as having no other authority than such as the commanding general of the district might allow; to authorize a convention of delegates to be elected by the male citizens

[1]Vol. II, p. 380, *et seq.*

of the state, twenty-one years old and upward, of whatever race, color, or previous condition, who had been resident in the state for one year previous to the day of such election, *except such as may be disfranchised for participation in the rebellion,* or for felony at common law; to authorize the convention thus chosen to frame a constitution of government in conformity with the Constitution of the United States in all respects, which constitution of the state government must provide that the elective franchise shall be enjoyed by all such persons as have the qualifications fixed by the act for electors of delegates; to have the constitution so framed ratified by a majority of the persons voting on the question of ratification, who are qualified by the act as electors of delegates. *It was then further provided that,* 'when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, *and when the state, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States prepared by the Thirty-ninth Congress, and known as Article XIV, and when said article has become a part of the Constitution of the United States,* said state shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said state; *provided that no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States shall be eligible to election as a member*

of the convention to frame a constitution for any of said rebel states, nor shall any such person vote for members of such convention.'"[1] (Italics ours.)

It is thus seen how closely the Eighteenth Amendment and the Reconstruction Acts were tied together. We cannot imagine a more complete and explicit avowal of an intent to reconstruct the governments of the secession States, so that former rejections by any of them of the Amendment could be treated as void and the assured ratifications of the Amendment by the succeeding "carpet-bag" governments could be counted.

The Attorney General of Wisconsin submits the following observations upon the "precedent" of the Fourteenth Amendment:

> "It is submitted that the force of the fourteenth amendment as a precedent cannot be waived aside upon any theory that the prior rejections of Georgia and the Carolinas were of no significance in that these rejections were by legislatures having no authority to act at all.
>
> "In view of the doubtful constitutionality of the reconstruction acts, *Ex Parte Milligan*, 4 Wall. 2, probably what we actually have with respect to the action of Georgia and the Carolinas in the matter of rejection of the fourteenth amendment is that of rejection by a validly constituted legislature and ratification by an invalidly constituted legislature. See Chs. 29 and 30, 3 Warren, The Supreme Court in United States History. If a proposed amendment may be rejected by a legally constituted authority and subsequently ratified by

[1] Section 5 of the first Reconstruction Act.

an illegally constituted authority, no reason at all is perceived why an amendment may not be rejected by a legally constituted authority and subsequently ratified by a legally constituted authority."

Ex parte Milligan was decided April 3, 1866, the opinion being delivered December 17, 1866. The first Reconstruction Act was not passed until March 2, 1867, so that the *Milligan* case, at best, could have only an indirect bearing upon the validity of that subsequent legislation. In that famous case it was held that a military commission, sitting in the loyal State of Indiana, where Federal authority was always unopposed and the courts always open, had no jurisdiction to try a person, not a resident of one of the rebellious States nor a prisoner of war, but a citizen of Indiana who was never in the military or naval service. Important as this decision proved to be in other respects, it can hardly be said to have foreshadowed a doubt as to the validity of the Reconstruction Acts.

The concluding sentence of Chapter 30 of Warren's "The Supreme Court in United States History," cited in the Wisconsin brief, is as follows: "Thus, this hotly contested legal question of the validity of the Reconstruction Laws disappeared from the Court's history, without any express decision."

In view of all this, it is hardly necessary to discuss the purely hypothetical case of a proposed amendment "rejected by a legally constituted authority and subsequently ratified by an illegally constituted authority."

WHAT IS A "REASONABLE TIME" FOR ADOPTION?

Here, for the first time, we come upon a judicial precedent. In the *Dillon* case [1] this Court examined Article V with a view to determining whether or not there is implied in its terms any limitation of the time within which a proposal by Congress for amending the Constitution must receive the approval of three-fourths of the States, if it is to become part of the Constitution. It concluded that there is such an implied limitation; that an alteration of the Constitution proposed today has relation to the sentiment and felt needs of today; that proposal and ratification are not unrelated acts but are succeeding steps in a single endeavor, not to be widely separated in time; that such an alteration is to be proposed only when Congress has concluded that there is a necessity for it and that consequently the proposal itself is to be considered and disposed of presently; that, since ratification is but the expression of the approbation of the people, it must be sufficiently contemporaneous in the requisite number of States to reflect the will of the people in all sections at relatively the same period, and that the proposal, if not adopted early while the sentiment which prompted it may fairly be supposed to exist, should be regarded as waived and not again to be voted upon, unless a second time proposed by Congress. And the Court added:

> "That this is the better conclusion becomes even more manifest when what is comprehended in

[1] Dillon v. Gloss, 256 U. S. 368, 65 L. Ed. 994.

the other view is considered; for, according to it, four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable."

We have restated these well-known declarations of the Court because we think the doctrine thus announced points the way to the solution of the questions stated in the opening paragraphs of this brief.

For a reason which we do not understand, this part of the opinion in the *Dillon* case has been sometimes described as something said by the way and not essential to the decision of the case. It was, on the contrary, the cornerstone of the decision. In that case the Court was required to find in the Constitution itself the answer to Dillon's question whether or not Congress had the power to limit the time within which a proposal for amending the Constitution should remain open to adoption. It was only upon the basis of a finding that the Constitution itself required that a proposal for its alteration be disposed of presently, that the Court based its decision that Congress had the power to enforce that requirement by fixing a definite time for adoption.

We discussed this question at length in our first

brief[1] and shall here re-open it only so far as is necessary to meet the counter-arguments found in adversary briefs.

We have heretofore[2] endeavored to answer the argument of this point by the Attorney General of Kentucky and have commented upon the opinion of the Supreme Court of Kansas on this subject.[3] The Attorney General of Kansas[4] takes his stand upon the ground that "it is the deemed necessity for the Amendment that gives it life and the same force must continue its life"; that, "before this Court can say that the proposed Amendment is dead, it must find that its death is the result of a neglect of the States not to ratify but to fail to continue its consideration"; that "a highly controverted question may demand much more time, not because of any lack of need or interest, but because of concentrated opposition on the part of a few selfish interests"; that "the selection of this method of ratification [that is, by legislatures instead of conventions] conveys the idea that the proposal to amend would and should remain alive indefinitely, because that legislative body is alive permanently"; that "this proposal to amend the Federal Constitution remains alive until some effective action is taken by Congress to extinguish it." He concludes his argument on this subject with a statement of the need in a democracy for educated citizens, in recognition whereof *the States* have enacted laws requiring school attendance, establishing

[1]Brief for respondents, *Chandler* v. *Wise*, pp. 42-54.
[2]Ibid., pp. 57-60.
[3]*Coleman* v. *Miller*, 146 Kan. 390, 71 Pac. (2d) 518.
[4]Brief for respondents, *Coleman* v. *Miller*, pp. 17-22.

juvenile courts, probation systems, playgrounds, etc. He then says:

> "Realizing the deterrent to such a program coming from private and selfish interests in the form of inducements to work for small pittances, the people realized the necessity for a Child Labor Amendment."

With much of this we can agree. Everybody is in favor of educating children and of protecting them against the dangers and injurious effects of improper employments. Compulsory school attendance, juvenile courts, probation systems and playgrounds are universally approved. It is quite true that the States have, as Attorney General Beck says, enacted laws for the latter purposes. He might truthfully have added that all the States have enacted laws prohibiting or regulating child labor. All this demonstrates, beyond question, that the people realize the need for governmental regulation of child labor but it does not demonstrate that they realize a necessity for the transfer of the power to exercise such control from the States to Congress. The history of the Amendment before the States demonstrates the exact contrary.

The Attorney General of Wisconsin[1] repeats the argument that Congress omitted a time limit from its proposal of the Child Labor Amendment because it "recognized that this Amendment was one with respect to which time and education might well be deciding factors as to whether the proposed Amendment

[1]Amicus brief, Wisconsin, p. 18 *et seq.*

would ever become a part of the Constitution of the United States." He then proceeds with a brief sketch of the complexity of our industrial civilization from which he concludes that the proposed Amendment "cannot lose its vitality by lapse of time". "The final form of the Amendment," he says, "was the result of months of deliberation by members of Congress, there having been some forty proposed amendments introduced in Congress by Senators and Representatives from fourteen States".

But, after all, Congress alone cannot alter the Constitution and it is apparent that, despite the labors of its members in drafting this proposal, they failed to draft it in terms which met the approval of the people, as expressed in the manner required by the Constitution.

The Solicitor General of the United States opens his discussion of this subject with the statement[1] that our argument "is, in effect, that a conclusive presumption of death arises upon the passage of such a period [*i. e.*, the time elapsed since the proposal of the Amendment], a presumption akin to that arising from seven years' unexplained absence without being heard from". "But the Child Labor Amendment", he says, "has been heard from incessantly".

We do not wish to take too seriously this figure of speech, which was probably intended as a mere rhetorical ornament, but, in case the statement was meant

[1]Amicus brief for United States, p. 24.

seriously, we take the liberty of translating it into realistic terms, as follows:

> "The argument that the proposed amendment of the Constitution is no longer open to ratification because it has failed of adoption within a reasonable time is akin to the legal presumption of the death of a human being from seven years unexplained absence."

The Solicitor General next criticizes the court below for relying upon the *Dillon* case as authority for the view "that the question of what is a reasonable time for the adoption of an amendment is a justiciable question". He says:

> "It was unnecessary in that case to consider whether a proposed amendment would expire with the passage of time in the absence of such a provision, and still less to consider whether the courts could be required to decide that a proposed amendment had in fact expired. It is true that the opinion in the case expressed the view that an amendment cannot pend indefinitely; but nothing was said concerning the authority which would be empowered to declare that the end had come. The answer to the latter question may well turn on the answer to another: whether States which have once ratified may thereafter revoke or rescind their ratification. If they can, the danger that a few States may supplement prior ratifications of an outdated proposed amendment is largely obviated; the States that have ratified can protect themselves by rescinding. The power of the States so

to do has not been judicially determined. Unless and until the power is held not to exist, much of the force is taken from the position that the courts may be required to decide whether a proposed amendment has lapsed. It is perhaps enough to say that distinguished authority can be found for the view that, until an amendment has been adopted by the ratifications of three-fourths of the States, the States do have power to rescind their ratifications."[1]

This argument is arresting for several reasons. In the first place, the Solicitor General, in the latter part of it, abandons a position which he had taken in an earlier part of his brief.[2] He had previously relied upon the doctrine, for which the proclamation of the Fourteenth Amendment is a clear political precedent, that a State cannot change from ratification to rejection and had made reference to Judge Jameson's "notable work" and to numerous other authorities in line with Jameson's conclusion, saying that "the same conclusion has been reached by virtually all who have discussed the question". But now he states the contrary rule with apparent approval, saying that "distinguished authority can be found for the view that, until an amendment has been adopted by the ratifications of three-fourths of the States, the States do have power to rescind their ratifications". (We note, in passing, that the Solicitor General seems no longer to be apprehensive of "the present downfall of the Fourteenth Amendment".)

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[1]Amicus Brief for U. S., pp. 25-26.
[2]Ibid., pp. 20 *et seq.*

In a footnote he gives citations to these "distinguished authorities", to-wit, "communications" from George Ticknor Curtis, Senator Reverdy Johnson, of Maryland, and William O'Conor, of New York, included in an address by C. H. Winfield ("privately printed, Jersey City, 1868"). He even cites the "purported" withdrawals by New Jersey and Ohio of their ratifications of the Fourteenth Amendment, despite the decision of Congress to ignore those withdrawals. But immediately thereafter he refers to other "authorities", who, if not as distinguished as Curtis, Johnson, O'Conor and Winfield, are at least more numerous, as taking "the view that a ratification cannot be rescinded", to-wit, Jameson, Burdick, Watson, Willoughby, Dodd, Garrett, Miller and Wheeler.

As to the Solicitor General's comment on the *Dillon* case, found in the passage from his brief quoted above, we submit that it is hardly accurate to say, as he does, that in that case the Court said nothing "concerning the authority which would be empowered to declare that the end had come". In that case the Court decided (1) that the Constitution itself inferentially limits the time within which a proposal for its alteration may be adopted, (2) that Congress has the power to define that limitation by fixing the exact time, "within reasonable limits", in which adoption must follow proposal, and (3) that the period of seven years fixed by Congress in that proposal was not too short but, on the contrary, was ample, in view of the much shorter time required for the adoption of all previous amendments. It is true that the Court did not say expressly that

seven years was not too long but, since the decision was based primarily on a finding that the Constitution itself required that proposal and adoption be not widely separated in time, it seems a necessary inference that, if it had been called upon to decide that question, it would have said that seven years was not too long.

But we are concerned here only with the Solicitor General's denial that in the *Dillon* case it was assumed that "the question of what is a reasonable period for the adoption of an amendment is a justiciable question". We think that it is an inescapable conclusion that the Court regarded all questions involved in the *Dillon* case, whether expressly decided or not, as justiciable. If they are not, then there is no power anywhere to enforce the requirement of the Constitution that adoption follow proposal within a reasonable time.

It is suggested by the Attorney General of Kansas[1] that this power resides in Congress. He says:

> "We contend that this proposal to amend the federal constitution remains alive until some effective action is taken by Congress to extinguish it."

We assume that it is meant by this that Congress has the power to withdraw a proposal for amendment at any time before its adoption. This has never been attempted and consequently the question has never been the subject of judicial consideration or decision,

[1]Respondents' Brief, *Coleman* v. *Miller*, Oct. Term, 1938, No. 7, p. 21.

but professional speculation on this question seems to be against the existence of such power.[1]

The Solicitor General concludes his argument on the subject of the lapse of a proposal for amendment with a review of the history of the Child Labor Amendment before the States.[2] This leads him to make some allusions to the supposed importance of the Amendment, a subject which we have studiously avoided because we think it not germane to the constitutional questions involved. Perhaps, however, we should notice some of his statements with reference to the present interest in the subject, since this is claimed as evidence of the continued vitality of the proposal.

The Solicitor General joins the Attorney General of Kentucky in claiming that there has been a fair continuity of favorable interest in the proposal from the beginning to the present time. He admits that there were only two ratifications from 1926 to 1932, inclusive, a period of seven years, but he says that those years were not barren of interest in the proposal since, "'in every odd-numbered year resolutions to ratify the Amendment were introduced in a substantial number of state legislatures,'' eleven in 1927, nine in 1929 and seven in 1931.

This information is found in "Appendix A" in the Solicitor General's brief. We do not question its accuracy, although it is not to be found in the tran-

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[1]Jameson, 4th ed., §585.
Orfield, "The Procedure of the Federal Amending Power," XXV Ill. Law Rev., 429.

[2]Amicus Brief for U. S., pp. 28-33.

script of record in this case. It will be noted in the first place that it was only in fifteen out of forty-four non-ratifying States that these resolutions were introduced and in only two of them did the resolution result in ratification. It cannot be claimed that this is a very impressive showing of favorable public sentiment during that time. After all, it is only by the adoption of resolutions of ratification that the Constitution can be altered. The mere introduction of twenty-nine such resolutions in the legislatures of fifteen out of forty-four recalcitrant States in the course of seven years can hardly be regarded as significant, particularly in view of the defeat of twenty-seven out of twenty-nine such resolutions.

The Solicitor General notes as "significant" that "no State which ratified has proposed to withdraw, while eight States which affirmatively rejected have subsequently ratified."

During the nine years succeeding the making of this proposal, only two States had attempted to change from rejection to ratification (to-wit, Colorado and Montana) and, beside these two, only four States had ratified. We can only guess at the motives which actuated these four States in standing by their original ratifications. It may, of course, have been because they were satisfied with their first action. It may have been due to a belief that such a change of position was not permissible under the Constitution, since this was the view of nearly all commentators on the Constitution. But the most likely explanation is that, during those years, it was almost universally believed that the pro-

posal had been conclusively defeated within a year or two after it was made and was no longer open to action of any kind.

The Solicitor General offers as evidence of the continued vitality of the 1924 proposal the present attitude of certain persons and organizations toward that proposal and their continued interest in it, to-wit; certain statements in a report of the Interstate Commerce Committee of the Senate in 1938; letters addressed by President Roosevelt on January 8, 1937, to the Governors of nineteen non-ratifying States whose legislatures were to meet in that year, urging them to press for ratification; "memorials" from the legislatures of Arkansas and California, urging President Roosevelt "to continue his efforts for ratification"; a statement in the *New York Times* of January 9, 1937, by former President Hoover, expressing his well-known partiality for the Amendment; certain publications of the United States Department of Labor, of the Children's Bureau, of the White House Conference on Child Health and Protection, of the President's Committee, 1933, of the American Federation of Labor, of the National Conference for Labor Legislation, of the International Association of Governmental Labor Officials, of the National Child Labor Committee, of the National Non-Partisan Committee for ratification of the Federal Child Labor Amendment, etc.

He even goes so far as to cite the favorable action of the Senate Judiciary Committee on Senator Van-

denburg's resolution for the proposal of a new and radically different child labor amendment, confining the proposed grant of power to Congress to the limitation and prohibition of "the employment for hire of persons under sixteen years of age." Of this Committee action, he says that it "made it clear that the pending Amendment had not lapsed, but merely that in the opinion of the Committee it was not likely to be ratified by the necessary majority of States,"[1] It is a little difficult to follow the argument that the opinion of the Committee that the pending Amendment was not likely to be adopted "*made it clear*" that it had not lapsed.

Of this roll-call of present supporters of the 1924 proposal we would only say that, with the exception of Mr. Hoover, of the American Federation of Labor and possibly of Mr. Burlingham's National Non-Partisan Committee for Ratification, all of these Committees, Bureaus, Conferences and Associations are, as we are advised, agencies or off-shoots of agencies of the Department of Labor. As to the American Federation of Labor, one of its motives was, we think, exposed by the present Secretary of Labor in February, 1934, when, in addressing the Kentucky legislature in advocacy of the proposal, she declared that "there is not enough work

[1]Senate Report 788, on the Vandenberg resolution, was handed in June 15, 1937, by Senator Logan of Kentucky, of the Judiciary Committee, with the following amendment:

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

to go around," and "we must preserve such jobs as there are for adults."

The Solicitor General's last witness is the redoubtable Dr. Gallup. He cites the results of two polls conducted by the Doctor's Institute of Public Opinion. Of the result of these polls he says:

> "The first, reported in May, 1936, showed that of more than 130,000 voters representing a cross-section of public opinion, 61 per cent favored the Amendment; and in 45 States the vote was favorable. Nine months later, in February, 1937, a second vote showed 76 per cent favoring the Amendment; in every State the vote was favorable."[1]

While Dr. Gallup's method of estimating the status of public opinion upon a given subject has, since the last presidential election, enjoyed a reputation for substantial accuracy, we think its inaccuracy in this instance can be demonstrated. Let us take the 1937 poll, since this is not only the latest but also the most favorable to the Amendment. The question which was put to the "cross-section" of the population in that instance was, "Do you favor an amendment to the Constitution giving Congress the power to limit, regulate and prohibit the labor of persons under 18?" This question, while stating accurately the terms of the 1924 proposal, would, we think, if put casually to the average person without further explanation, be

[1] Amicus Brief for U. S., p. 33.

not unlikely to strike him as a mere inquiry as to his opinion of governmental control of child labor. The poll itself gives us no assurance that the persons who answered this question had their attention called to the existing regulation of child labor by all the States, nor to the greatly reduced number of employed children as contrasted with, say, ten years earlier, nor to other like considerations. For example, in connection with the report of the result of the 1936 poll, Dr. Gallup gave as "typical" the following explanations of their votes by persons who voted "Yes":

> "Children under eighteen should all be in school, not out working, there is plenty of time for that later."
>
> "It will help solve unemployment by providing more jobs for older people who need work most."
>
> "We must protect our children. They can't stand shop work. It ruins their health."[1]

It is obvious that persons who gave such explanations were not considering the relative advantage of State and Federal control.

In the poll of February, 1937, every State in the Union was reported by Dr. Gallup as being in favor of the Amendment and the percentage of all voters who favored ratification was reported to be 76, as against 61 per cent. in 1936.

Let us compare this with the poll of its members taken by the American Bar Association nine months

[1]Copyright article by American Institute of Public Opinion; The Dallas Morning News, May 24, 1936.

later, in November, 1937. The referendum ballots, sent to all members of the Association, contained five questions, which were answered by 14,388 members, although 572 of these ballots were not counted because not accompanied by signature slips. We confine ourselves to the second of these questions, since this is the question which was the basis of Dr. Gallup's polls:[1]

> "*Question Two:* Do you favor the ratification of the amendment, submitted to the States in 1924, providing that Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age?"

The vote was,

Yes: 2,743; No: 10,840.

By majorities, the States stood as follows,

Yes: None; No: 48 States.

The percentage of voters in favor of the proposal was 20, as against Dr. Gallup's 76. The majority in every State was against the proposal, whereas Dr. Gallup reports every State in favor of it.

How are these divergent results to be explained? Admitting that the average opinion of the legal profession may not be the same as that of the public at large, so that some difference in percentages might be expected, it seems improbable that there is a diametric opposition between them. Lawyers are, after all, mem-

[1] XXIII Am. Bar Assn. Journal, No. 12, Dec., 1937, p. 915.

bers of the general community. Their employments bring them in contact with the opinions, problems and prejudices of the generality of mankind. They fill a large proportion of elective offices, an occupation in which a "feel" for, and obedience to, the trends of public opinion is usually regarded as indispensable. We cannot think, therefore, that the Bar Association poll has any less claim to recognition as an index of public opinion than the Gallup poll.

Dr. Gallup, in the report of his poll of February 21, 1937,[1] upon which the Solicitor General relies, featured the following statement:

> "Other states which will be called upon to consider the amendment this year and their vote in today's poll, are:

	Favoring Amendment	Opposing Amendment
Connecticut	81%	19%
Delaware	65	35
Florida	71	29
Georgia	76	24
Kansas	66	34
Maryland	71	29
Massachusetts	55	45
Missouri	66	34
Nebraska	72	28
Rhode Island	88	12
South Carolina	66	34
Tennessee	63	37
Texas	69	31
Vermont	70	30"

Despite the very heavy majorities in these States in favor of the Amendment, as reported by Dr. Gallup,

[1]The Topeka Daily Capital, February 21, 1937.

the action of the legislatures of the States named in their 1937 sessions was as follows: In two of the States (South Carolina and Vermont) no resolution was introduced; in three of them (Florida, Georgia and Rhode Island) resolutions of ratification were introduced but were not brought to a vote; in one of them (Kansas) the validity of a purported ratification is challenged in court; in the remaining eight States a resolution was introduced and was defeated. Ten of these States had affirmatively rejected the Amendment and the remaining four had defeated resolutions of ratification, one in 1924, eleven in 1925 and two in 1927.

What a tragic showing for Dr. Gallup's contemporaneous estimate of the status of public opinion in these States. Is it conceivable that the legislatures of those States, meeting under a fresh mandate from the people of those States, voted in utter defiance of the overwhelming sentiment of the people who had elected them? Although Dr. Gallup gave 70 as the average percentage of favorable opinion in all of those States, not a single one of these fourteen States (except Kansas, where the result is still doubtful) ratified the proposal. We submit that such a defiance of public opinion is inconceivable and that the inevitable conclusion is that Dr. Gallup's appraisal of public sentiment in those States was grossly inaccurate.

The Solicitor General of the United States makes this statement:[1]

[1]Amicus Brief for U. S., p. 31.

"It has not been suggested, nor could it be, that the conditions giving rise to the Amendment have been eliminated. The prevalence of child labor, the diversity of state laws and the disparity in their administration, and the resulting competitive inequities, are facts that exist today as they did in 1924."

We agree that the evil effects of unrestricted child labor justify continual, governmental control and that the conditions which have given rise to that control in every State in the Union would probably arise again, if that control were removed. But we do not agree that the conditions which gave rise to the proposal of the pending Amendment "exist today as they did in 1924". In support of this we offer the following tables, compiled from United States Census statistics for 1920 and 1930, as showing a marked decrease in the number of children gainfully employed, even in that short period of time:

	Total Population 10 to 14 years of age	Gainfully Employed, 10 to 14			
		Agriculture	Manufacturing and Mechanical Industries	Miscellaneous Occupations	Total in all Occupations
1920	8,594,872	328,297	9,733	40,033	378,063
1930	9,622,492	205,563	4,761	25,004	235,328

	Total Population, 14 and 15 years of age	Gainfully Employed, 14 and 15			
		Agriculture	Manufacturing and Mechanical Industries	Miscellaneous Occupations	Total in all Occupations
1920	3,907,710	315,877	175,919	190,999	682,795
1930	4,678,084	263,934	63,505	104,351	431,790

	Total Population 10 to 16 years of age	Total Gainfully Employed, 10 to 16			
		Agriculture	Manufacturing and Mechanical Industries	Miscellaneous Occupations	Total in all Occupations
1920	12,502,582	644,174	185,652	231,032	1,060,858
1930	14,300,576	469,497	68,266	129,355	667,118

In addition, the records of the United States Census Bureau, covering two decades instead of one, show that the number of boys and girls under sixteen, working in all occupations, including farming, decreased more than 66 per cent. from 1910 to 1930.

We also submit the following table, prepared by the Industrial Division of the Federal Children's Bureau:

TABLE 1—Children 14 and 15 years of age receiving first regular employment certificates and rate per 10,000 of these ages in 41 cities, 1927-34.

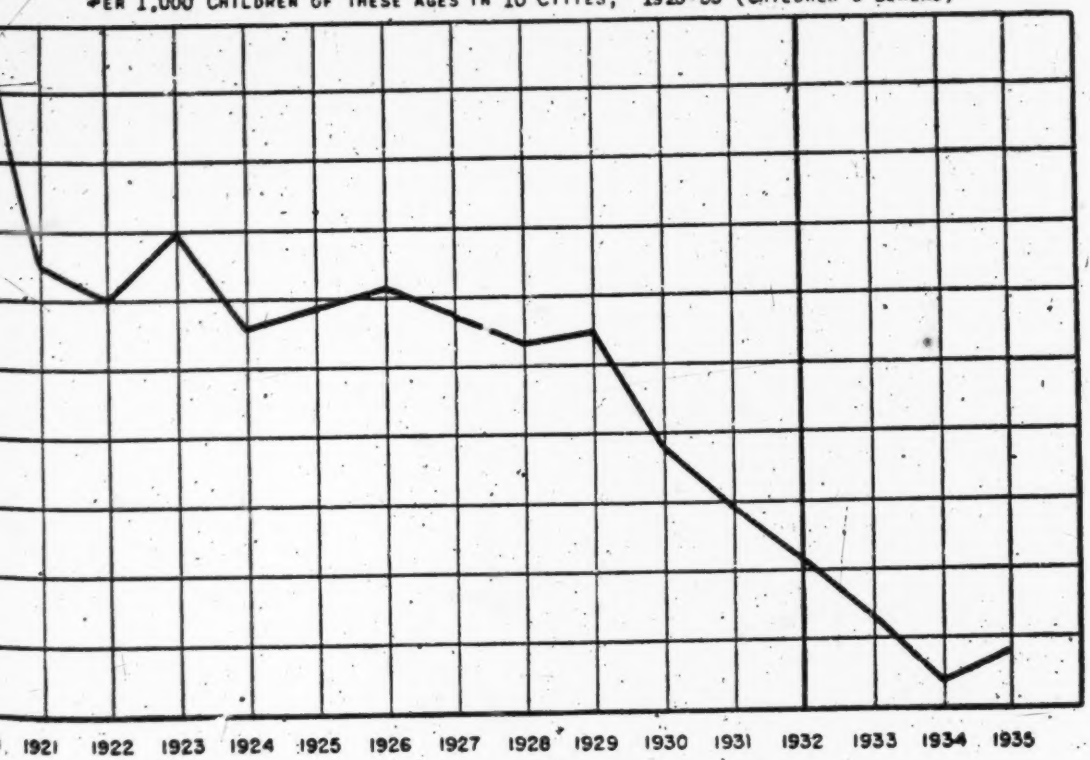
Year	Number	Rate per 10,000 children of these ages	Percent of Change in rate as compared with previous years
1927	71,655	978	.....
1928	67,199	893	—8.7
1929	71,857	930	+4.1
1930	49,082	619	—33.4
1931	37,051	460	—25.7
1932	27,556	336	—27.0
1933	17,042	210	—37.5
1934	5,415	67	—68.1

The Robert Committee, which was formed to investigate the departures from labor and trade practice standards of codes following the invalidation of the NRA, said in its report released on March 17, 1936:

"The provisions of the codes with reference to the employment of children appear to have been better maintained than any other code provision surveyed. The reports from individual establishments would indicate no serious departure from child labor provisions."

To the foregoing we add the following graph, prepared and published by the Federal Children's Bureau, covering fifteen years, 1920 to 1935:

NUMBER OF CHILDREN 14 AND 15 YEARS OF AGE RECEIVING EMPLOYMENT CERTIFICATES PER 1,000 CHILDREN OF THESE AGES IN 10 CITIES, 1920-35 (CHILDREN'S BUREAU)



These statistics speak for themselves. They show that, as a result of State regulation, which itself was the product of an improved public sentiment on this

subject, the evils of child labor are being rapidly eliminated. In view of this, can it be said that *the felt needs* of 1924 are the same as those of 1939? If by the end of 1940 or 1941 the 1924 proposal should be ratified by enough additional States to make up the required three-fourths, could it be said that it had been adopted while the sentiment which prompted the proposal in 1924 could "fairly be supposed to exist"? If, in those circumstances, it had been made to appear that the Congress of 1939 or that of 1940 was of a different mind from the Congress of 1924 (as, for example, by its proposal of the so-called Vandenberg Amendment), could it be said that Congress and three-fourths of the States had co-operated in "a single endeavor"?

But we shall not pursue these speculations further. What has been suggested shows, we think, to what a travesty the process of amending the Constitution might be reduced, if it should be concluded that the States are powerless to defeat a proposal for amendment.

CONCLUSION.

The excursions of adversary counsel into the field of existing conditions in the employment of children and of public opinion on that subject, have induced us to follow them into that field, although we think the results of this investigation throw little, if any, light upon the constitutional questions involved in this case.

We are painfully conscious of the desultory character of this brief, a fault which was unavoidable, if the multiform arguments found in adversary briefs were to be answered. We depend upon our original brief for a methodical and consecutive statement of our position.

In conclusion, we beg to urge again the importance of a definitive decision of the constitutional questions presented. If this brief has no other utility, it must, at least, have exposed the confusion in which the subject is enveloped because of the conflict of opinion as to the correct interpretation of the Constitution. In our first brief, we emphasized the unhappy consequences which had actually arisen, in the case of the Child Labor Amendment, from the assumption that affirmative rejections of the proposal were of no avail and that a final defeat of that proposal was an impossibility. We expressed the view that such an endless state of vacillation and uncertainty would not have been countenanced by the framers of the Constitution and that the power conclusively to defeat a proposal for amendment was necessarily implied in the power reserved to the States to make the final decision.

We submit that the opinion of the court below demonstrates the correctness of its judgment and that the judgment should be affirmed.

Respectfully submitted,

LAFON ALLEN,
OLDHAM CLARKE,
Attorneys for Respondents.

March, 1939.

SUPREME COURT OF THE UNITED STATES.

No. 14.—October Term, 1938.

Albert Benjamin Chandler, Individually and as Governor of the Commonwealth of Kentucky, et al., Petitioners,

vs.

James W. Wise and Ray B. Moss.

On Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky.

[June 5, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In January, 1937, the legislature of Kentucky adopted a resolution purporting to ratify the constitutional amendment proposed by the Congress in 1924 and known as the "Child Labor Amendment".[1]

Respondents, citizens, taxpayers and voters in Kentucky brought this suit in the state court to restrain the Governor of the Commonwealth and the officers of the General Assembly from sending certified copies of the resolution to the Secretary of State of the United States and the presiding officers of the Senate and House of Representatives, and for a judgment declaring the action of the General Assembly to be illegal and void. The complaint stated that in 1926 the proposed amendment had been rejected by the General Assembly of the Commonwealth and also by more than a majority of the legislatures of the States, and that the General Assembly could not thereafter legally reconsider and adopt the amendment; and, further, that its action was not taken within a reasonable time after the amendment was proposed.

Upon the filing of the petition, a restraining order was granted and summons was issued. On the same day, but before the Governor was actually served with a copy of the restraining order or summons, he forwarded by mail a certified copy of the resolution to the Secretary of State. It is not claimed that the Governor then knew of the pendency of the proceeding.

Plaintiffs then filed an amended petition setting forth the action taken by the Governor and sought a mandatory injunction to require him to notify the Secretary of State of the pendency of the suit and that the notice which he had sent was void and should be disregarded. That action was not taken. Defendants filed a gen-

[1] 43 Stat. 670.

eral demurrer which was sustained in the Circuit Court but its judgment was reversed by the Court of Appeals. 270 Ky. 1.

The court gave opportunity on the remand to the Circuit Court, with directions to overrule the demurrer, for such further proceedings as were not inconsistent with its views. Upon that remand the defendants declined to plead further and judgment was entered in accordance with the opinion of the Court of Appeals. The judgment so entered set forth (1) that an actual controversy existed between the parties, that the plaintiffs had the right to maintain the suit and the court had jurisdiction; (2) that the resolution of the legislature purporting to ratify the proposed amendment was void, not having been ratified according to the provisions of the Constitution of the United States; (3) that the notice given by the Governor to the Secretary of State was of no effect; (4) that the clerk of the court should give official notice to the Department of State that the resolution purporting to ratify the amendment was invalid, that it had not been ratified according to the provisions of the Constitution of the United States, and that the notice given by the Governor was of no effect. The clerk was further directed to send a duly authenticated copy of the judgment to the Secretary of State by registered mail.

On appeal, that judgment was affirmed by the Court of Appeals. We granted certiorari. 303 U. S. 634.

We think that, while the state court had jurisdiction *in limine*, the writ of certiorari should be dismissed upon the ground that after the Governor of Kentucky had forwarded the certification of the ratification of the amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination.

Dismissed.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER think that the judgment of the Court of Appeals of Kentucky should be affirmed on the authority of *Dillon* v. *Gloss*, 256 U. S. 368, and for the reasons stated in the dissenting opinion in *Coleman* v. *Miller*, decided this day.

Mr. Justice BLACK and Mr. Justice DOUGLAS, concurring.

For the reasons stated in concurring opinion in *Coleman* v. *Miller*, we do not believe that State or Federal courts have any jurisdiction to interfere with the amending process.

We therefore concur in the dismissal.